

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 25  
SUBREGION 33**

MCHENRY EXCAVATING, INC.,	)	
	)	
Employer,	)	
	)	
And	)	
	)	
INTERNATIONAL UNION OF OPERATING	)	
ENGINEERS, LOCAL 150 AFL-CIO.	)	Case 25-RC-255764
	)	
Petitioner.	)	
	)	
And	)	
	)	
NATIONAL ALLIED WORKERS UNION,	)	
LOCAL 831.	)	
	)	
INTERVENOR.	)	

**EMPLOYER’S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR’S  
DECISION TO ORDER A MAIL BALLOT ELECTION IN THE RE-RUN  
ELECTION AND TO IMMEDIATELY STAY THE ELECTION**

**I. STATEMENT OF THE CASE**

McHenry Excavating, Inc. (“Respondent”) files the following Request for Review of Regional Director Patricia K. Nachland’s (the “Regional Director”) Decision to hold a mail ballot election and requests that the Board immediately stay the mailing of ballots in this election based on the reasons set forth below.

**II. PROCEDURAL HISTORY**

Pursuant to a stipulated election agreement, an election was conducted in the above captioned case on February 20, 2020, to determine whether certain employees of Respondent the wished to be represented for purposes of collective bargaining by International Union of Operating Engineers, Local 150 (Petitioner) or National Allied Workers Union, Local 831 (Intervenor), or

wished to be unrepresented. This Election was a manual, in-person election as stipulated to in the Stipulated Election Agreement.

The amended tally of ballots that issued on February 20, 2020, showed that of the approximately 18 eligible voters, 7 ballots were cast for Petitioner, 11 ballots were cast for Intervenor, and zero ballots were cast against representation. There were no challenged ballots. Thereafter, on February 27, the Petitioner filed timely objections to conduct affecting the results of the election, a copy thereof being served on the Employer and Intervenor.

On August 31, 2020, the Regional Director issued her decision concluding that facts and issues raised by the Petitioner's Objections 3 and 4 raised substantial and material issues of conduct by a party that affects the results of the February 20, 2020, election which necessitates that the election be set aside and that a re-run election be conducted.

On September 14, 2020, the Employer and Intervenor filed a Request for Review of the Regional Director's Decision to set aside the first election and to hold the re-run election. This Request for Review is still pending before the Board.

Thereafter, the Regional Director ordered a mail-ballot election in the re-run election by letter dated September 25, 2020. There was no agreement by any of the Parties to hold a mail ballot election, nor was there a hearing to determine if an in-person manual election was appropriate. Ex. 1.

On October 1, 2020 the Regional Director issued an Erratum and Revised Notice of Election, revising the eligibility of voters to include those employees who had been employed for 30 working days or more in the past 12 months prior to the election date or had some employment in the past 12 months and were employed at least 45 working days in the past 2 years. The Order also stated that unit employees in the military services for the United States may vote

“if they appear in person at the polls.” This Order for unit employees to vote in person was set forth in the Order despite the fact that a mail-ballot election had been ordered. Ex. 2

### III. ARGUMENT

#### A. **The Regional Director Failed to Hold a Hearing to Gather Relevant Facts to Make Any Decision with Respect to Whether to Hold a Mail Ballot or in Person Election and Failed to Issue an Decision Stating Her Reasoning for Deciding to Hold a Mail Ballot Election**

No formal hearing took place in this matter to determine the issue of whether or not a mail ballot election would be appropriate in this matter. While the Regional Director has some discretion in ordering a mail ballot election, such a decision must be supported by facts of each individual case. At the very least, the Parties should have the opportunity to present their respective positions on whether or not they are agreeable to an in person election on the record.

On April 17, 2020, through a press release, the Office of Public Affairs stated that Regional Directors have discretion with respect to where and if an election can be conducted in accordance with existing Board precedent. The Board specifically noted that Regional Directors will consider the “extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state, and local laws and guidance.” See, <https://www.nlrb.gov/news-outreach/newsstory/covid-19-operational-status-update>.

The Regional Director can then take such factors listed in the press release into consideration in rendering a decision on whether or not to hold a manual or mail ballot election. The Regional Director should also take into consideration any evidence the Employer may wish to provide concerning its willingness to take proper actions consistent with those suggested in the General Counsel’s Memorandum 20-10, titled, *Suggested Manual Election Protocols* which issued on July 6, 2020 addressing protocols for holding a manual election. In this Memo, the General Counsel noted that Regional Directors have authority delegated by the Board to make

initial decisions about when, how, and in what manner all elections are conducted. However, the General Counsel stated that the Regional Director's will continue to make, these decisions on a case-by-case basis, "considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality." The General Counsel sets forth the proposition that if certain protocols are met, it would allow for a manual election.

Consistent with the proposition that the Regional Director should take into consideration the variables in each case when considering whether to hold a manual election, in each and every Representation Case the undersigned has reviewed in which the issue of holding a mail ballot or manual election is at issue, the Regional Director has issued a Decision specifically stating the reasons why they were ordering a mail ballot election, citing specific facts and details about COVID-19, the spread of the virus in the community in which the election is to be held and the reasons why a manual election was not inappropriate in those cases.

In each of the Representation Cases in which a Request for Review has been filed, the Party filing the Request for Review has then had an opportunity to at least argue that a manual election could be held utilizing the facts and reasoning in the Regional Director's Decision to argue their point as to why a manual election could be held. In at least two cases to date, the Board has granted Review and those cases are pending. *See, Perdue Foods LLC d/b/a Draper Valley Farms and Teamsters Local Union No. 252 Affiliated with the International Brotherhood of Teamster*, 370 NLRB No. 70 (2020), *Aspirus Keweenaw and Michigan Nurses Association, Petitioner* 370 NLRB No. 13 (2020).

For whatever reason, there was no hearing to determine whether a manual ballot election was appropriate and therefore there is no formal position of the Parties on record. Because there was no hearing, the Employer has been denied its due process rights to be able to argue the reasons why a manual election could be held in this case. The undersigned is left with no facts or legal analysis made by the Regional Director to support her reasoning for holding a mail ballot election in this case because no hearing was held, and no written Decision was issued. The issue of the manner and means of holding elections has been a point that has been argued in more than 50 cases since the middle of March when Regions stopped holding manual elections. By failing to hold a hearing and issuing a written Decision addressing this as Regional Directors since March, 2020, all of the Parties in this matter have been denied their right to due process and fairness and it is the request of the Employer in this Case that the Board grant review and immediately stay the election and the mailing of the ballots which are to be mailed on October 13, 2020. Staying the election in this matter also allows the Board the time to review the Requests for Review filed by the Intervenor and Employer with respect to the Region's Decision to overturn the results of the first election held on February 20, 2020.

**B. The Regional Director's Decision to Hold a Mail Ballot Election is not Supported by any Analysis of any Facts and is A Departure from Clear Board Precedent**

Had the Region allowed the Employer to file a brief after any hearing, the Employer would have been able to show that a manual election should be held in this case. The National Labor Relations Board ("the Board") has repeatedly held that a manual election, with the direct supervision of a Board Agent, is the most effective way to protect employees' right to a free and fair vote in a representation election. Manual elections are the presumptive method of conducting an election according to the Board's policy and prior rulings and while the Regional Director has discretion in determining if an election should be held by mail or manually, such discretion "is not

unfettered and is to be exercised within certain guidelines.” *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998).

The reason manual elections are the most effective method for conducting elections is clear. It allows a Board Agent to be present during voting, it insures that there is no interference with the voter in the time just before they vote and the Board has itself acknowledged that the “voter participation rate is generally higher in elections conducted manually than in mail ballot elections.” *San Diego Gas* at 1146; see also *Cast N. Am. (Trucking) Ltd. v. NLRB*, 207 F.3d 994, 1000 n.2 (7th Cir. 2000)(“The NLRB has noted that historically voter turn-out has been higher in representation elections that are conducted manually than in those conducted by mail.”).

The importance of having a Board Agent present during voting cannot be overlooked or undervalued. The Board has stated that this is the reason it prefers manual elections. “Because of the value of having a Board agent present at the election, the Board’s longstanding policy to which we adhere, has been that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location.” *Id.*; This is because without such oversight, the risk that the laboratory conditions surrounding the election are destroyed is certainly increased. *See, Brink’s Armored Car*, 278 NLRB 141 (1986)(“The danger that the laboratory conditions surrounding an election may be destroyed are greater in mail balloting situations than in manual elections because of the absence of direct Board supervision over the employees’ voting.”); *Thompson Roofing, Inc.*, 291 NLRB 743 at fn. 1 (1988)(“Mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections because of the absence of direct Board supervision over employees’ voting.”).

On April 17, 2020, through a press release, the Board stated that Regional Directors have discretion with respect to where and if an election can be conducted in accordance with existing

Board precedent. The Board specifically noted that Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state, and local laws and guidance. *See*, <https://www.nlr.gov/news-outreach/newsstory/covid-19-operational-status-update>.

On July 6, 2020, the General Counsel issued his Memorandum Memo 20-10, titled, Suggested Manual Election Protocols on July 6, 2020 addressing protocols for holding a manual election. In this Memo, the General Counsel sets forth the proposition that if certain protocols are met, it would allow for a manual election. These include the following:

1. Polling times procedures for releasing voters must be sufficient to accommodate social distancing/cleaning requirements, without endangering participants by unnecessarily elongating exposure among Board Agents and observers;
2. Any election agreement or Direction of Election should specify:
  - The maximum number of representatives for each party who can attend the pre-election conference and the ballot count;
  - Whether there will be a voter release schedule to ensure that voters are not crowded, depending on circumstances of the election;
  - The number of voter lists; and
  - The number of observers per party during the election, which should be limited to one each where feasible.
3. Only one voter will approach the observers' table(s) and election booth(s) at a time to ensure social distancing;
4. After clearance by the observers, the Board Agent will place an individual ballot on table for the and then step back to maintain social distance;

5. Voting will include use of newer cardboard booths, if available, which are easier to keep clean than the older aluminum booth. The Board Agent will disinfect the booth before it is brought back into the NLRB office and before any other employees handle it;

6. If more than one booth is used, booths must be more than six feet apart.

The General Counsel has issued Certification documents as well that if adhered to, would allow the holding of a manual election.

In the instant Case, the election at issue involves voting by approximately 20 employees. The proposed polling period would be 45 minutes to an hour long at the most and the number of persons in the polling area could be controlled during this time frame.

Moreover, the Employer has committed to using its garage which is approximately 80 feet by 50 feet and it can keep the bay doors open. This would ensure adequate social distancing and the open space will help with ventilation. The Company will commit to placing spacing markers on the floor, will provide proper PPE including masks, gloves, disinfectant and screen guards for the observers and Board Agent to stay behind when voters are checking in to help to provide the safest measures possible to hold a manual election. More specifically, the Employer in holding the election agrees to provide the following:

- a. A spacious polling area (in this case an 80 foot by 50 foot space), sufficient to accommodate six-foot distancing, which will be marked on the floor with tape to insure separation for observers, Board Agent, and voters;
- b. Separate tables spaced six feet apart so Board Agent, observers, ballot booth and ballot box are at least six feet apart.
- c. The Employer will provide markings on the floor to remind/enforce social distancing.



- d. The Employer will provide sufficient disposable pencils without erasers for each voter to mark their ballot.
- e. The Employer will provide glue sticks or tape to seal challenge ballot envelopes.
- f. The Employer will provide plexiglass barriers of sufficient size to protect the observers and Board Agent to separate observers and the Board Agent from voters and each other, pre-election conference and ballot count attendees, as well as masks, hand sanitizer, gloves and wipes for observers.

By agreeing to take these measures, this should satisfy the Region's concerns in holding a manual election in a safe manner.

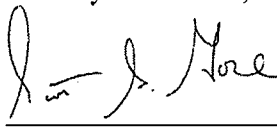
With respect to the Board's certification protocols prior any election and after any election, the Employer agrees to adhere to all pre-election and post-election certification requirements set forth in the GC's Memo including all requirements set forth in GC Memo 20-10 and the attached Certifications.

For the reasons discussed above, the it is the Employer's position that a manual ballot election can be held safely and for these reasons it respectfully requests that the election in the above referenced matter be held manually rather than by mail ballot.

#### **IV. CONCLUSION**

For these reasons, the Employer respectfully requests that the Board grant this Request for Review in this case and that the Board Stay the Election until it resolves both the instant Request for Review and the pending Request for Review previously filed by the Intervenor and Employer on September 14, 2020.

Respectfully submitted,

By: 

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Scott A. Gore

Scott A. Gore  
Laner Muchin, Ltd.  
515 N. State Street  
Suite 2800  
Chicago, IL 60654  
(312) 467-9800 (Phone)  
(312) 467-9479 (Fax)  
[sgore@lanermuchin.com](mailto:sgore@lanermuchin.com)

**CERTIFICATE OF SERVICE**

The undersigned, an attorney of record, hereby certifies that on October 8, 2020 electronically filed the attached **REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION TO ORDER A MAIL BALLOT ELECTION IN THE RE-RUN ELECTION AND TO IMMEDIATELY STAY THE ELECTION** via the National Labor Relations Board website and sent a copy to the following via electronic mail.

**Via the NLRB e-filing system**

National Labor Relations Board  
1015 Half Street SE  
Washington, D.C. 20570-0001

**via the NLRB e-filing system and via electronic mail**

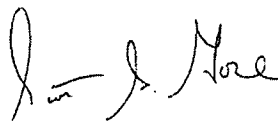
Patricia Nachand, Regional Director  
National Labor Relations Board, Region  
25, Sub-region 33  
101 SW Adams St.  
Suite 400  
Peoria, Illinois 61602  
patricia.nachand@nlrb.gov

**Via electronic mail**

Robert A. Paszta  
Associate General Counsel  
Local 150 Legal Department  
6140 Joliet Road  
Countryside, IL 60525  
rpaszta@local150.org

**Via electronic mail**

Brandon A. Anderson  
Jacobs, Burns, Orlove & Hernandez  
150 N. Michigan Avenue, Suite 1000  
Chicago, IL 60601  
banderson@jbosh.com



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Scott A. Gore



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

SUBREGION 33  
101 SW Adams St  
Suite 400  
Peoria, IL 61602

Agency Website: [www.nlrb.gov](http://www.nlrb.gov)  
Telephone: (309)671-7080  
Fax: (309)671-7095

September 25, 2020

*VIA EMAIL or FAX ONLY*

Fax: (708) 482-7186  
International Union of Operating  
Engineers, Local 150, AFL-CIO  
6200 Joliet Rd  
Countryside, IL 60525

[nawulocal831@sbcglobal.net](mailto:nawulocal831@sbcglobal.net)  
Frank Stroud  
National Allied Workers Union, Local 831  
125 Windsor Dr  
Suite 118  
Oak Brook, IL 60523

[matt@mchenryexcavating.com](mailto:matt@mchenryexcavating.com)  
Matt Rogulic  
McHenry Excavating, Inc.  
1903 State, Rt. 31  
McHenry, IL 60050

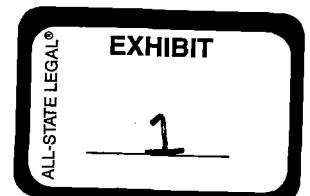
Re: McHenry Excavating, Inc.  
Case 25-RC-255764

Greetings:

This letter will confirm the details of an election arranged in the above matter pursuant to the Regional Director's Decision on Objections, Order Setting Aside Election, and Direction of Re-Run Election. It also provides information about the voter list and posting the election notices.

**Voter List**

The employer must provide the regional director and parties an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters, **accompanied by a certificate of service** on all parties.



To be timely filed and served, the list must be *received* by the regional director and the parties by Tuesday, September 29, 2020. **The region will no longer serve the voter list.** The employer's failure to file or serve the list within the specified time or in the proper format is grounds for setting aside the election whenever proper and timely objections are filed. However, the employer may not object to the failure to file or serve the list in the specified time or in the proper format if it is responsible for the failure.

The list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the employer must electronically file the list with the regional director and electronically serve the list on the other parties. Electronic filing of the list with the NLRB through the Agency website is preferred but not required. To file electronically, go to **www.nlr.gov**, click on **E-File Documents**, enter the **NLRB case number**, and follow the detailed instructions. The list also may be submitted to our office by email or fax to (309)671-7095. The burden of establishing the timely filing and receipt of the list is on the sending party.

### **Posting and Distribution of Election Notices**

The Employer must post copies of the attached Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted at least 3 full working days prior to 12:01 am on the day of the election and must also distribute the Notice of Election electronically to any employees in the unit with whom it customarily communicates electronically. The Notice of Election must be posted so all pages are simultaneously visible. In this case, the notices must be posted and distributed **before 12:01 a.m. on Wednesday, October 7, 2020**. The employer's failure to timely post or distribute the election notices is grounds for setting aside the election if proper and timely objections are filed. However, a party is stopped from objecting to the nonposting or nondistribution of notices if it is responsible for the nonposting or nondistribution.

To make it administratively possible to have election notices and ballots in a language other than English, please notify the Board agent immediately if that is necessary for this election. Also, as noted in paragraph 10 of the stipulated election agreement, if special accommodations are required for any voters, potential voters, or election participants to vote or reach the voting area, please tell the Board agent as soon as possible.

### **Election Arrangements**

The arrangements for the election in this matter are as follows:

**Date and Time Mail Ballots to be Sent to Voters:** October 13, 2020 at 11:00 a.m. ET

**Date Voters Are Requested to Notify Regional Office if Mail Ballot Not Received or Replacement Ballot Is Needed:** October 21, 2020

**Date Mail Ballots from Voters Must Be Received by Regional Office:**  
November 3, 2020

**Date, Time and Place of Ballot Count:** The ballot count will be held on  
November 10, 2020 at 10:00 a.m. CT via video conference.

Representatives of the parties are invited to attend and observe the ballot count via video conference at which time they must voice any challenges to any of the ballots.

Enclosed is a Description of Election and Post-Election Procedures in Representation Cases, Form NLRB-5547, which describes the election and the method for handling challenges as well as post-election proceedings to deal with determinative challenges and any objections that are filed.

If there are any questions, please feel free to contact Field Examiner TIFFANY L. MILLER at telephone number (309) 218-1729 or by email at [tiffany.miller@nrlrb.gov](mailto:tiffany.miller@nrlrb.gov). The cooperation of all parties is sincerely appreciated.

Very truly yours,

PATRICIA K. NACHAND  
Regional Director

By: /s/ Nathaniel E. Strickler

NATHANIEL E. STRICKLER  
Officer in Charge

Enclosures:

1. Notice of Election
2. Designation of Observer Form
3. Description of Procedures in Election and Post-Election  
Representation Case Procedures (Form 5547)

cc: [elarose@local150.org](mailto:elarose@local150.org)  
Elizabeth A. LaRose, Attorney  
International Union of Operating  
Engineers, Local 150, AFL-CIO  
6140 Joliet Rd  
Countryside, IL 60525-3956

[banderson@jbosh.com](mailto:banderson@jbosh.com)  
Brandon M. Anderson, Attorney  
Jacobs, Burns, Orlove & Hernandez LLP  
150 N. Michigan Ave., Suite 1000  
Chicago, IL 60601

[sgore@lanermuchin.com](mailto:sgore@lanermuchin.com)  
Scott A. Gore, ESQ.  
Laner Muchin, Ltd.  
515 N State St Ste 2800  
Chicago, IL 60654-4688

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 25  
SUBREGION 33

MCHENRY EXCAVATING INC.  
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and

INTERNATIONAL UNION OF OPERATING  
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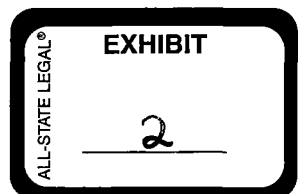
and

NATIONAL ALLIED WORKERS UNION, LOCAL  
831  
Intervenor

**ERRATUM**

The second paragraph of the section labeled “Direction of Re-Run Election” of the Regional Director’s August 31, 2020, Decision on Objections, Order Setting Aside Election, and Direction of Re-Run Election (the section begins on page 4) is hereby corrected as follows:

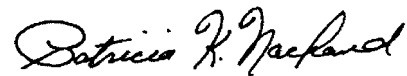
Eligible to vote in the re-run election are those employees in the unit who were employed during the payroll period ending immediately before the issuance of the Notice of Re-Run Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit(s) who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the date of the first election, employees engaged in such strike who have retained their status as





strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Dated at Indianapolis, Indiana this 1st day of October, 2020.



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PATRICIA K. NACHAND  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 25/SUBREGION 33  
101 SW Adams Street, Suite 400  
Peoria, IL 61602